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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

LARRY DEAN SMITH,

Petitioner,

-v.-

STATE OF OKLAHOMA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

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QUESTIONS PRESENTED

1. Whether petitioner's conviction of murder in the first degree, despite the complete lack of evidence that he either participated in the killing or intended the victim's death, failed to satisfy due process requirements.

2. Whether the trial judge's refusal, despite a timely request, to charge the lesser included offense of murder in the second degree, in a case where the evidence supported such a lesser charge and where the proof of intent to commit the greater capital charge was highly questionable, deprived petitioner of his due process and eighth amendment rights.

3. Whether the trial court's refusal to allow defense counsel to see the sheriff's notes on petitioner's admissions, on the grounds that they constituted "work product," denied petitioner due process and the right to confrontation.

4. Whether the death sentence imposed on petitioner, a nineteen year old with no prior record whose participation in the crime was relatively slight, violated the eighth amendment when it was based on the single, questionable aggravating circumstance that the murder was "especially cruel" and when it may have been arrived at after undue coercion.

5. Whether petitioner's death sentence should be summarily reversed on the ground that Oklahoma has failed consistently to adhere to the requirements of Witherspoon v. Illinois by approving, in petitioner's case as in many others, the exclusion of jurors who merely voiced general objections to the death penalty.

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No. 82 -

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

LARRY DEAN SMITH,

Petitioner,

v.

STATE OF OKLAHOMA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Criminal Appeals of Oklahoma entered on February 10, 1983.

CITATION TO OPINION BELOW

The opinion of the Court of Criminal Appeals of Oklahoma is reported at 659 P.2d 330 (1983). It is annexed as Appendix A. The order denying rehearing is unreported. It is annexed as Appendix B.

JURISDICTION

The judgment of the Court of Criminal Appeals was entered on February 10, 1983. A timely motion for rehearing was denied on March 28, 1983. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> nor shall any State deprive any person of life, liberty, or property, without due process of law;

the Fifth Amendment to the United States Constitution, which provides in relevant part:

> no person...shall be compelled in any criminal case to be a witness against himself;

the Sixth Amendment to the United States Constitution, which provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed...; to be confronted with the witnesses against him; ...and to have the Assistance of Counsel for his defence.

and the Eighth Amendment to the Constitution of the United States, which provides in relevant part:

> Excessive bail shall not be required, ...nor cruel and unusual punishments inflicted.

This case also involves provisions of the Code of Oklahoma, the text of which are set out in Appendix C.

STATEMENT OF THE CASE

Petitioner Larry Dean Smith, nineteen years of age and with no prior record, was convicted of Murder in the First Degree (O.S. 21 §701.7A) and sentenced to death. Ralph Goforth, who, although only sixteen years old, had several violent incidents in his background and seemed to be the instigator in this crime, was convicted after a separate trial of the same killing, and sentenced to life in prison. In the Matter of R.P.R.G., 584 P.2d 239, 242 (Okla. Cr. 1978); Goforth v. State, 644 P.2d 114 (Okla. Cr. 1982).

The Exclusion of Death-Scrupled Jurors

As a "preliminary question" to the entire panel, the court first asked whether, if the evidence warranted the death penalty, any jurors would be unable, due to moral or religious convictions, to impose it (V. 18).* After objection by counsel, the judge rephrased the question in two ways, asking first whether the jurors' belief regarding the death penalty "would or possibly could prevent [them] from returning a...guilty verdict." Then, purportedly rephrasing the same question, the court asked: "In other words, if you found the defendant guilty beyond a reasonable doubt, would you be in a position to take into consideration the full range of punishment as provided by the laws of the State of Oklahoma?" (V. 20) Counsel interposed a continuing objection to the court's formulation of the question (V. 22).

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* Numerals preceded by "V" refer to the voir dire examination at petitioner's trial, held May 16, 1978. Counsel's request for an individual voir dire was denied (V. 13-14).

Sixteen jurors were excused for cause based on their statements concerning the death penalty.* Ms. Prather, asked what her answer would be, presumably to one or more of the various versions of the court's question, responded: "I don't really feel like I could." She was excused without any further inquiry (V. 22). Ms. Frogue was excused based on her statement: "I don't think so" (V. 23). Mr. Rollins was excluded after expressing the opinion: "I think it would be hard to do" (V. 24). Three jurors (Mr. Allton, Mr. Sheaffer and Ms. Arnold) were excused upon their statement: "I don't believe in the death penalty" (V. 27, 47).**

The Evidence at Trial

Petitioner was charged by information with the deliberate, intentional murder of Willard H. Denning, in that, with malice aforethought, he effected his death by beating and burning him (T. 4).*** He was not charged as an accomplice, and no instructions were given regarding the law on criminal liability for the conduct of another (Court's Instructions #1-9). He was also not accused of felony-murder as provided by O.S. 21 §701.7B or O.S. 21 §701.8(2).

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* Ms. Prather (V. 22); Ms. Frogue (V. 23); Mr. Rollins (V. 24); Mr. Hunnicut (V. 26); Mr. Allton (V. 27); Mr. Atkinson (V. 28); Mr. Sheaffer (V. 47); Ms. Arnold (V. 47); Ms. Woodrome (V. 84); Ms. Garrett (V. 87); Ms. Duree (V. 101); Mr. Boyer (V. 103); Mr. Pollock (V. 116); Ms. Brooks (V. 117); Ms. Kuder (V. 134); Ms. Cook (V. 137).

** Inexplicably, Mr. Sheaffer and Ms. Arnold were omitted from the list of jurors excused for cause given by the Oklahoma Court of Criminal Appeals, 659 P.2d at 334, n.3.

*** Numerals preceded by "T" refer to the transcript of trial, held on May 17-19, 1978.

A passer-by discovered a burned pick-up truck with human remains in the camper at about 1:30 p.m. on September 6, 1977 (T. 17-19; 31-32). He notified the Picher Police Department, who sent Patrolmen Jackie Crockett and Ladell Morgan* to investigate (T. 23). Upon seeing the burned truck and what appeared to be a body in the back, Morgan contacted the Sheriff's Office, and shortly Sheriff Floyd Ingram arrived on the scene (T. 24, 30-31). The Sheriff ordered the taking of a number of photographs of the camper, personal articles and tools strewn around the area, and foot and motorcycle tire prints (T. 32, 42-43, 47, 140). He also saw shell casings and empty beer bottles in the area (T. 140). The Sheriff called on a lab technician to examine some of the physical eivdence (T. 32). The tools and tool box were sent to be examined for fingerprints (T. 163). The body was taken to a medical examiner (T. 174-6), who conducted an autopsy which revealed that the man, identified as Willard Denning,** had died from thermal burns and smoke inhalation (T. 183).

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* Defense counsel's motion for a continuance based on Morgan's unavailability at the time of trial was denied. Morgan was the arresting officer, and counsel attempted to show that petitioner's arrest was illegal as not based on probable cause (V. 4, 12). The trial court held that counsel's motion to suppress physical evidence and admissions on the ground that they were the fruit of an illegal arrest had been waived by not being raised before arraignment (V. 8). The Oklahoma Court of Criminal Appeals approved the denial, but on the different ground that the missing officer's testimony would have added little to the other testimony at the motion to suppress. Smith v. State, 659 P.2d at 333.

** The victim's identity was shown by the testimony of Mary Lovelace, a former landlady of Denning, and Kenneth M. Denning, the victim's brother. Mrs. Lovelace claimed to recognize, from the State's photograph, the burned pickup as belonging to Denning, although the two features of Denning's truck that she was sure of, Arizona tags and its red and white color, were not visible in the black and white picture (T. 198-201). She said she saw Denning for the last time on September 4, 1977, and had expected him back later in that week (T. 200-02). Kenneth Denning identified a set of engraved tools found at the scene as belonging to his brother (T. 207-09).

Officers Morgan and Crockett left the scene once the Sheriff arrived and proceeded to a local store that sold beer (T. 25). They then went to petitioner's residence, where they saw a motorcycle parked in the front yard (T. 28).* Petitioner was not at home, however, and the officers eventually located him, together with Ralph Goforth, at the Brass Rail at about 3:30 p.m. (T. 26-27, 90). Morgan and Crockett took the two suspects to the police station, where they were turned over to Ottawa County Dep. McClintic (T. 27). According to petitioner's testimony during the motion to suppress, Sheriff Ingram took his clothing, fingernail scrapings and hair samples (T. 99-100). Arresting Officer Morgan had already examined his hands and his shoe soles (T. 28, 90).

Petitioner was questioned twice by Sheriff Ingram, once at about 5:00 p.m. and again at 10:00 p.m. At the 5 o'clock interrogation, petitioner admitted being at the scene, but said he had not hurt the man in the pickup (T. 133-134). When the Sheriff asked him further questions, Smith said that was all he wanted to say (T. 116). At the later questioning,** he admitted being at the chat pile where the truck was found, but still denied in any way hurting the man (T. 137-38, 153). He stated that he and Goforth

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* Other officers later seized this motorcycle, and pictures of the cycle were admitted into evidence (T. 142-43). Sheriff Ingram started to testify that the tire prints matched the tracks at the scene, but an objection was sustained based on lack of a foundation and insufficient expertise (T. 143). A motion at the end of trial to exclude the motorcycle pictures because they were never connected to the tire tracks was overruled after the Assistant District Attorney argued that the jury should be able to compare the exhibits (T. 226-228).

** Petitioner's motion to suppress the statements as involuntarily made, the product of an illegal arrest, and obtained after he had expressed his wish to remain silent, was denied (T. 110-12, 132).

had met a man standing outside his camper earlier in the day, and had drunk some beer with him at his invitation (T. 136-37). Then they left, but returned later, at Goforth's suggestion, planning to rob the man (T. 149-50). When they arrived at the truck, Denning was sitting inside the camper. Goforth went in and beat him up, causing his head to bleed, and petitioner helped him take personal belongings out of the truck (T. 137-38). Goforth took the man's wallet but said there was no money in it. They partially buried a tool box, planning to return for it. Then the two decided to take the truck, but could not get it started because the coil wire was missing (T. 138-39). Petitioner began to leave. Before Goforth joined him, petitioner saw Goforth place "some paper, or something" under the front seat of the truck* (T. 139). They left on the motorcycle, bought some more beer, rode around a while, then went home (T. 140).

Sheriff Ingram described petitioner's admissions from memory at trial. He had taken notes at the interrogation eight months earlier, and had these notes with him on the stand (T. 151). Defense counsel's request to see those notes was denied, however, when the sheriff asserted that he had not looked at them prior to his testimony (T. 151-52).

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* At the preliminary hearing, but not at trial, the sheriff testified that petitioner admitted seeing Goforth actually start the fire (P.H. 12-13). Even in the preliminary hearing version, however, petitioner denied in any way helping Goforth to set the fire. Because defense counsel was refused access to the sheriff's notes (see text immediately below), their contents on this point remain unknown.

The State rested without having produced any physical evidence to connect petitioner with the killing (T. 153, 208). The motorcycle tire tracks, the footprints, the beer bottles, the tool box, all found at the scene of the fire and apparently all subjected to scientific examination, revealed nothing inculpating petitioner. Similarly, petitioner's clothing, hair, fingernails, hands and shoe soles, also investigated, led to nothing incriminating. At the close of the State's case, defense counsel demurred to the information, stating that the State had failed to prove the acts alleged in the complaint beyond a reasonable doubt (T. 222-23). The demurrer was overruled, and the defense then rested (T. 224).

Counsel requested an instruction on the lesser included offense of Murder in the Second Degree (O.S. 21 §701.8); the court refused to give that instruction on the ground that it was "not warranted by the evidence or law in the case" (T. 232). The prosecutor argued in his summation that petitioner could be responsible for the murder even if he had not done the actual killing, since the victim was killed during a robbery:

> I think that if you will look at the photographs, the motorcycle and the motorcycle tire, look at the photograph of the motorcycle tracks, you can see that there is no problem with reasonable doubt as to whether or not Larry Dean Smith was there that night or not. He said he was. He said all he did was just help rob the man. Well, ladies and gentlemen, you can't go rob a bank and say I didn't do it, I just drove the get away car. You can't say, well, kings x (sic), I'm going to go back in and give the money back. The man driving the get away car is just as guilty as the man who robs the bank. If you go with some one to rob somebody and you participate in it and somebody gets killed, you can't say, oh, I didn't mean for that

> to happen. I didn't want to do that part. I just wanted to do the robbing. I didn't want to do the killing. You can't do that. The man is dead.... The State has carried every element. We have shown malice aforethought. We have shown the death. We've shown the deliberate. It was not justified homicide, it wasn't an accident. It wasn't manslaughter, it was murder in the first degree. It happened during a robbery (T. 244-45).

After more than four hours' deliberation, the jurors returned with a guilty verdict (T. 264, 268).

The Sentencing Proceeding

The State presented no further evidence at sentencing (T. 272). Petitioner testified that he was nineteen years old, married but in the process of obtaining a divorce, with a two year old daughter (T. 273-74). He had never before been convicted of any crime (T. 273).

The State relied exclusively on Oklahoma's fourth aggravating circumstance, namely that the murder was "especially heinous, atrocious or cruel" (T. 276, Stage Two Instruction #1). Of the eight "minimum mitigating circumstances" presented to the jury, some evidence had been presented that four applied to petitioner:

> 1. The defendant has no significant history of prior criminal activity;
>
> 5. The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor;
>
> 7. At the time of the murder, the capacity of the defendant to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law was impaired as a result of... intoxication;
>
> 8. The age of the defendant at the time of the crime. (Stage Two Instruction #6).

The jury was not required to disclose what mitigating circumstances, if any, it found (Stage Two Instruction #7).* The jury retired to consider petitioner's sentence at 10:15 a.m.. At 3:00 p.m., the jury sent a message to the court:

> "Your Honor, we the jury would like to know if the law will permit us, the jury, to recommend life in prison without parole. Thank you. Foreman."

The judge responded:

> "You may make such a recommendation but it is not binding on the court. The court has no authority to incorporate such recommendation in its judgment and sentence. Signed Judge Fullerton." (T. 285).

The jury returned with a death sentence at 4:25 p.m. (T. 286-87).

In a motion for a new trial, petitioner's appellate counsel, Mr. Mountford, presented an affidavit asserting that the trial judge had told Mountford, who was in the courtroom conducting a civil deposition late on the afternoon of the jury's deliberations, that he had sent a note to the jury telling them that if they did not return with a sentence in ten minutes, they would be discharged and a life sentence imposed. When Mountford expressed surprise, the judge stated: "That's what the law provides."** Smith v. State, 659 P.2d 330, 338-39 (Brett, J. dissenting). The trial court, at first denying that he had sent the

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* The trial judge in his post-sentence report stated that only mitigating circumstances #1 and #8 were in evidence.

** O.S. 21 §701.11 provides, in pertinent part:
...If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life.

second note, but then asserting only that he did not recall sending such a note, id. at 340, refused counsel's request to subpoena one or more members of the jury to resolve the dispute. Id. at 341. Judge Brett of the Oklahoma Court of Criminal Appeals dissented from affirmance of petitioner's death sentence because of the unresolved questions surrounding this second note. Id.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. Petitioner first challenged the sufficiency of the evidence at the preliminary hearing (P.H. 48). He demurred to the information at trial, specifically alleging that the State presented insufficient evidence to prove the corpus delicti, and to prove murder in the first degree (T. 224). Petitioner again challenged the sufficiency of the evidence in his motion for a new trial, at p. 1, and on appeal to the Oklahoma Court of Criminal Appeals (Points I and II of Appellant's Brief). The court held that the State had proved that petitioner possessed the requisite intent for murder in the first degree. Smith v. State, 659 P.2d at 333. Finally, petitioner again raised the issue of the insufficiency of the evidence in his petition for rehearing (Proposition III, at p. 8).

2. Petitioner's request for an instruction on murder in the second degree was denied by the trial court (T. 232). Petitioner presented the issue to the appellate court (Point III of Appellant's Brief), which found that the instruction was not warranted, since the "evidence clearly does not suggest a passive disregard of Denning's life, but rather an active intention that he should die." Smith v. State, 659 P.2d at 334. Petitioner raised the issue once again in his petition for a rehearing (Proposition IV, at pp. 9-10).

3. Petitioner requested production of the notes on his post-arrest statement both at the preliminary hearing (P.H. 28) and at trial (T. 151). This request was denied on the basis of the Oklahoma work product doctrine (T. 151-52). His failure to include

this issue on appeal to a court that had consistently upheld the application of this evidentiary rule to unsworn statements should not preclude review in this Court. Denial of access to notes of admissions, in a capital case, also constitutes such fundamental deprivation of due process as to warrant review as "plain error". Vachon v. New Hampshire, 414 U.S. 478, 481 (1974).

4. The propriety of the death sentence imposed on petitioner was challenged on appeal (Points IV, IX and XI). The Oklahoma Court of Criminal Appeals, one judge dissenting, dismissed the argument that the jury may have been coerced into its verdict by a second note sent by the trial judge. Smith v. State, 659 P.2d at 336, 338-41. The court held that the jury was justified in finding the killing especially heinous, atrocious and cruel, and that the death sentence was not disproportionate, despite the co-defendant's life sentence. Id. at 337-38. The court distinguished Enmund, saying that petitioner's sentence was not "excessive in relation to his role in effecting Denning's death". Id. at 334, n. 2. Petitioner raised the Enmund question again in his petition for rehearing (Proposition III at p. 8); he also challenged the adequacy of the court's instructions on mitigating circumstances (Proposition VI at pp. 13-15).

5. Petitioner was twice permitted to enter a continuing objection to the trial court's formulation of the questions concerning opposition to the death penalty (V. 22, 105). In addition, petitioner objected specifically to the excusal of two veniremen on Witherspoon grounds (V. 88, 116). On appeal, petitioner raised the

issue that several jurors were improperly excluded (Point VIII of Appellant's Brief). The appellate court, refusing to acknowledge the continuing objection as sufficient, deemed objection to the three veniremen specifically mentioned on appeal to have been waived. Smith v. State, 659 P.2d at 334-35 and n. 6. The court apparently did consider petitioner's claim on the merits, however, asserting that eleven veniremen were properly excluded under Witherspoon. Id. at 334 and n. 5. The court erroneously found that only fourteen jurors had been excused for their objections to the death penalty, id. at 334, n. 3, omitting two of the more glaring excusals, those of Mr. Sheaffer and Ms. Arnold, who had simply stated: "I don't believe in the death penalty." (V. 27, 47).

REASONS FOR GRANTING THE WRIT

I

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER PETITIONER'S CONVICTION OF MURDER IN THE FIRST DEGREE, DESPITE THE COMPLETE LACK OF EVIDENCE THAT HE EITHER PARTICIPATED IN THE KILLING OR INTENDED THE VICTIM'S DEATH, FAILED TO SATISFY DUE PROCESS REQUIREMENTS.

Nowhere in the 131 pages* constituting the evidence at petitioner's trial will the Court find any evidence whatever that petitioner committed any act causing the death of Willard Denning. The record is equally barren of any evidence whatever that petitioner intended or attempted to effect the death of Mr. Denning. At the very most, the evidence implicated petitioner in a robbery of the victim which took place prior to his death. Even if the killing had been established to have taken place during a felony, and if petitioner had been sufficiently connected to that robbery, the conviction could not stand since petitioner was never charged with felony-murder.** Given the total lack of any evidence to show that petitioner committed a killing or had the intent to kill, his conviction must be reversed. Jackson v. Virginia, 443 U.S. 307 (1979); In re Winship, 397 U.S. 358 (1970).

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* The State rested, according to the transcript, at p. 208. Pages 55 to 132 comprise the motion to suppress held outside the hearing of the jury.

** Felony-murder is murder in the first degree in Oklahoma if the felony is forcible rape, robbery with a dangerous weapon, kidnapping, escape from lawful custody, first degree burglary or first degree arson. O.S. 21 §701.7B. Homicide during the commission of any other felony is murder in the second degree. O.S. 21 §701.8(2). Petitioner was not charged under either section.

The most damaging evidence aga[illegible] the only evidence directly connecting him wi[illegible] statement. Yet petitioner's admission, [illegible] Ingram at trial, implicated him only in t[illegible]m. Petitioner stated that he saw Ralph Gofor[illegible] that he and Goforth took personal items, inclu[illegible]ls, out of the camper. In the only reference [illegible]he killing, petitioner said he saw Goforth p[illegible]me-thing" (T. 139) under the front seat of t[illegible]om observing Goforth set a fire,** and an ev[illegible]lp-ing Goforth to set the truck on fire.

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* The Sheriff testified that in Goforth' [illegible] blamed the beating on petitioner (T. 153-[illegible] statement should have been excluded as he[illegible] under any co-conspirator exception, see F[illegible] (Okl. Cr. 1980), since no evidence of con[illegible] the State. Goforth did not testify, there[illegible] violated petitioner's sixth amendment rig[illegible] see Bruton v. United States, 391 U.S. 123 [illegible] serving statement contained none of the i[illegible] might make it admissible under recent hol[illegible] Ohio v. Roberts, 448 U.S. 56 (1980).

Even if Goforth's statement was proper[illegible] if counsel's failure to object to its admiss[illegible] right to exclusion of the evidence, and i[illegible] ment credible, proof that petitioner be[illegible] evidence that he participated in the kill[illegible] medical examiner, the victim died because beating (T. 183).

** The Sheriff's preliminary hearing testi[illegible] petitioner had admitted to seeing Goforth [illegible] course, not before the jury and cannot be [illegible] the sufficiency of the evidence. Moreover[illegible] testimony could support the conclusion tha[illegible] in petitioner's presence, no evidence what[illegible] petitioner aided, assisted or encouraged G[illegible] Petitioner's mere presence or acquiescence [illegible] committed a crime would not make him an aide[illegible]

Petitioner's admissions, even were they sufficiently corroborated under Oklahoma law, see Jones v. State, 555 P.2d 63 (Okl. Cr. 1976), are thus wholly inadequate to support his conviction of murder in the first degree. Petitioner did not state that he killed Denning, that he helped to kill Denning, that he was present when Denning was killed, or even that he was present when a fire was started that endangered Denning's life.

Nor did other evidence presented by the State fill the glaring omissions in petitioner's statement. The State presented no physical evidence about how, or when, the fire was started. The burned camper was discovered more than 14 hours after petitioner said he was at the scene. Although it is possible to speculate that the "paper, or something" placed under the seat by Goforth might have started the fire 14 hours earlier, such speculation falls far below a finding beyond a reasonable doubt by any rational trier of facts that such was the cause of the fire. At least one other possible cause is plausible enough necessarily to preclude such a finding: Denning suffered from cirrhosis of the liver, most probably caused by chronic alcoholism (T. 190-191); the alcohol level in his body, even after some amount had no doubt boiled away during the fire, was .09 percent (T. 191); he evidently drank some beers with petitioner and Goforth (T. 136-37); the possibility of an accidental fire under these circumstances can

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*Fn. Cont'd from previous page
Oklahoma law. Hindman v. State, 647 P.2d 456 (Okl. Cr. 1982); Frazier v. State, 624 P.2d 84 (Okl. Cr. 1981); Turner v. State, 477 P.2d 76 (Okl. Cr. 1970).

surely not be dismissed, and was indeed found to be entirely consistent with the physical examination of the body (T. 191-92).

Absolutely no physical evidence connected petitioner either to the alleged beating or to the fire. Despite the extensive examination of the scene, including scientific tests of several pieces of evidence, and the scrutiny of petitioner's clothing, hair, hands, fingernails and shoes upon his arrest within a day, not a single item of proof tied petitioner to the killing. Even the motorcycle tire tracks were not shown to have been made by the motorcycle petitioner drove (T. 143).* Nor was evidence presented that petitioner had in fact bought beer at the Quick-Stop late that evening, for whatever value that might have had to connect petitioner to the empty beer bottles at the scene.

The lack of evidence that petitioner participated in an intentional killing is such that the jury's verdict finding him guilty would be inexplicable but for the prosecutor's arguments in his summation. The prosecutor converted petitioner's admission that he helped to rob the victim into a confession of first degree murder. Despite the fact that petitioner was not charged with felony-murder, the prosecutor insisted that petitioner could be held responsible for the killing even if he was merely a participant in the robbery:

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* The prosecutor urged the lay jury to make the comparison the Sheriff had been prohibited from making due to an inadequate showing of expertise (T. 244).

> ...If you go with some one to rob somebody and you participate in it and somebody gets killed, you can't say, oh, I didn't mean for that to happen... I didn't want to do the killing. You can't do that. The man is dead... (T.244)

The prosecutor thus neatly dispensed with the requirement that the State prove petitioner's intent to kill. In his only specific reference to the State's proof that the killing was deliberate, the prosecutor assured the jurors:

> ...We have shown malice aforethought... We have shown the death. We've shown the deliberate... It wasn't manslaughter, it was murder in the first degree. It happened during a robbery... (T. 245)

Since the jury heard this summation after being given the court's charge (T. 234), it is not unreasonable to assume that it took the district attorney's statement of the law as correct.

The Oklahoma Court of Criminal Appeals did not, of course, have the option of affirming the conviction of intentional murder on a theory of felony-murder. See Presnell v. Georgia, 439 U.S. 14 (1978). Instead of supplying a different legal standard, the appellate court relied on additional "facts," not supported by the trial record, to affirm petitioner's conviction and death sentence. According to the court, petitioner admitted "that he was present at the time the pickup was set ablaze," 659 P.2d at 332; evidence, according to the court, showed that petitioner and Goforth tried to steal the truck, "that the pickup was then set ablaze; and that the appellant and Goforth fled from the location, knowing that their beaten victim was lying in the camper part of the burning pickup." 659 P.2d at 333. The only evidence introduced at trial, however, even remotely suggesting that petitioner might have been present when the fire

was started was his highly inconclusive admission that he saw Goforth put "some paper, or something" under the seat. The court's version of the facts, upon which it based both its refutation of the argument addressed to the sufficiency of the evidence and its approval of the failure to charge murder in the second degree (see Point II below), is wholly unsupported by the evidence presented at trial.

The State failed to prove either that petitioner, by his acts, participated in the killing, or that he deliberately intended to cause the victim's death. No rational trier of fact could have found the existence of each necessary element beyond a reasonable doubt. Accordingly, petitioner's conviction must be reversed.

II. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE TRIAL JUDGE'S REFUSAL, DESPITE A TIMELY REQUEST, TO CHARGE THE LESSER INCLUDED OFFENSE OF MURDER IN THE SECOND DEGREE, IN A CASE WHERE THE EVIDENCE SUPPORTED SUCH A LESSER CHARGE AND WHERE THE PROOF OF INTENT TO COMMIT THE GREATER CAPITAL CHARGE WAS HIGHLY QUESTIONABLE, DEPRIVED PETITIONER OF HIS DUE PROCESS AND EIGHTH AMENDMENT RIGHTS.

Even if the evidence were held sufficient, when viewed in the light most favorable to the prosecution, to prove petitioner's complicity in the homicide, the court committed reversible error highly damaging to petitioner when it refused counsel's request to charge the lesser included crime of murder in the second degree. Particularly in this capital case, refusal to provide the jury with the option of finding guilt of a lesser, non-capital, offense deprived petitioner of his due process rights. Beck v. Alabama, 447 U.S. 625 (1980). Since the evidence in petitioner's case warranted the lesser offense instruction, especially given the extremely weak, if not non-existent, showing that petitioner possessed the requisite intent for murder in the first degree, his conviction must be reversed and a new trial ordered. See Hopper v. Evans, 102 S. Ct. 2049 (1982).

As in Beck v. Alabama, 447 U.S. 625, petitioner admitted in post-arrest statements that he was involved in a robbery of the victim. Petitioner Smith's complicity in the homicide, however, was even more tenuous than Beck's. The question of intent was in most serious dispute; the issue of whether petitioner committed any act in furtherance of the killing was also subject to grave doubt. Under these circumstances, the jury could well have found, based on the evidence, that petitioner was guilty of murder in the second degree, defined in Oklahoma as a homicide "perpetrated

by an act imminently dangerous to another person and evidencing a depraved state of mind regardless of human life, although without any premeditated design to effect the death of any particular individual..." O.S. 21 §701.8(1). Counsel's request to submit this lesser charge should have been granted.

Under Oklahoma law,* the trial judge was required to instruct on lesser included offenses "unless the evidence is so conclusive as to disallow the reasonable jury from finding the existence of a lesser crime." Gilbreath v. State, 555 P.2d 69, 70 (Okl. Cr. 1976). To deny counsel's request, the trial court therefore was required to find conclusive the evidence that petitioner caused Denning's death "with malice aforethought." O.S. 21 §701.7A. He was also required to find, conclusively, that petitioner had a "premeditated design to effect [Denning's] death." O.S. 21; §701.8(1). Neither the trial court nor the Oklahoma Court of Criminal Appeals** supported these findings,

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* By statute,

> The jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense. O.S. 22 §916.

The trial judge did not inform the jury of this right. (Court's Instructions.)

** The appellate court held:

> "...when the appellant and his accomplice rode away from the scene, leaving Denning lying in the back of a burning pickup, they must have known he would not live. The evidence clearly does not suggest a passive disregard to Denning's life, but rather an active intention that he should die." 659 P.2d at 334.

(Cont'd)

and, indeed, such findings are totally inconsistent with the trial record. The inference that petitioner participated in the killing, with the conscious design to effect death, can only be based on a series of less and less likely assumptions about the implications of his statements and the circumstances of the victim's death. Most significantly, the jury had to infer that petitioner was present when the fire started (despite the lack of evidence on that point), that he committed some act to make him responsible as a principal for setting the fire (also unsupported by the record), and that, by that act, he evinced the deliberate intention to kill the victim (despite the failure of proof regarding how the fire was set and how fast or far it might be expected to spread).

While it is therefore clear that evidence of petitioner's intent to kill Denning remained in grave doubt, the jury had reason, given only the choice of convicting Larry Dean Smith of first degree murder or acquitting him entirely, to vote for a conviction. Petitioner's admission that he helped Goforth remove personal items from the camper after Denning had been beaten implicated him in a serious, violent felony. His failure to act when Goforth placed "some paper, or something" under the seat of the pickup, if taken by the jury as his acquiescence in setting the truck on fire (but see Point I, at p. 17 above) placed him at the scene of an even more serious crime. A jury faced with only two options, conviction or acquittal, was very likely "to resolve its doubts in favor of conviction," Keeble v. United States, 412 U.S.

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* Fn. Cont'd from previous page

Even if the facts had been as the court stated them, which they were not, (see pp. 16-18 supra), the conclusion that Smith, assuming arguendo that he did see Goforth light the fire, had the deliberate intent to kill Denning is hardly inescapable. The jury could just as reasonably have concluded that his conduct, "imminently dangerous to another person", was reckless and depraved, but not intentional.

205, 213 (1973), despite the prosecution's failure to prove each element of the offense charged. As this Court noted in Keeble, theoretically the jury, given such a choice, must acquit the defendant. "But a defendant is entitled to a lesser offense instruction - in this context or any other - precisely because he should not be exposed to substantial risk that the jury's practice will diverge from theory." Keeble v. United States, 412 U.S. at 212.

The "substantial risk" that a jury will convict of a higher charge, if not given the option of finding guilt on a lesser count, despite doubts about one or more elements of that charge, is particularly unacceptable in a capital case. Beck v. Alabama, 447 U.S. at 637; Gardner v. Florida, 420 U.S. 349 (1977). The effect of the trial court's refusal to instruct on murder in the second degree, despite the fact that the evidence clearly warranted such an instruction, was identical to the procedure held unconstitutional in Beck, precluding a lesser charge. The Court should therefore grant certiorari to clarify that failure to charge a lesser count in a proper case, even without a statute prohibiting such a charge, will invalidate a conviction of a capital crime.

III.

THE COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER THE TRIAL COURT'S REFUSAL TO ALLOW DEFENSE COUNSEL TO SEE THE SHERIFF'S NOTES ON PETITIONER'S ADMISSIONS, ON THE GROUNDS THAT THEY CONSTITUTED "WORK PRODUCT," DENIED PETITIONER DUE PROCESS AND THE RIGHT TO CONFRONTATION.

The State's case against petitioner relied almost exclusively on his alleged statements to Sheriff Ingram. The sheriff testified to these incriminating words at the trial, held approximately eight months after he obtained the admissions. The sheriff had described the statements in significantly different terms at the preliminary hearing.* Yet notes taken by the sheriff at the time of petitioner's statements were kept from defense counsel, not only before the trial, but even during the cross-examination of the officer at the trial. This application of Oklahoma's evidentiary "work product" rule to deprive petitioner of access to a contemporaneous written version of his own statement, in a capital case, denied him his rights under the fifth, sixth, eighth and fourteenth amendments to the United States Constitution.

Sheriff Ingram's recollection of petitioner's statement was, at the preliminary hearing or at trial, or at both, faulty. In order effectively to cross-examine this witness, whose testimony on the admissions was critical to the State's case, counsel sought to inspect written notes taken at the time the statements were made. Denial of access to these notes deprived

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* While the admission described at the preliminary hearing was more damaging to petitioner than that testified to at trial, petitioner was prejudiced by the use of the more incriminating statement in the opinion of the Court of Criminal Appeals (see pp.19-20 supra). Petitioner would surely have benefited if the notes reflected only the statement as given at trial.

petitioner of his right to confrontation of the witnesses against him. See Davis v. Alaska, 415 U.S. 308 (1974).

Oklahoma attempts to justify refusal to disclose written notes of pretrial statements of a criminal defendant by application of its evidentiary "work products" doctrine. Oklahoma thus places unsworn* police notes on defendants' statements in the same category with attorneys' strategy memoranda and detectives' field investigations. See e.g. Perez v. State, 614 P.2d 1112 (Okl. Cr. 1980); Curtis v. State, 518 P.2d 1288 (Okl. Cr. 1974). Such an interpretation of an evidentiary rule to deny a capital defendant access to what may be the most reliable evidence of what he actually said conflicts directly with that defendant's confrontation rights. See Davis v. Alaska, 415 U.S. 308. Alaska's interest in the confidentiality of the record of a juvenile offender was surely more weighty than Oklahoma's ostensible interest in protecting police notes on confessions, yet that interest had to give way to the constitutional right of confrontation. Id. at 320.

The notion upon which the Oklahoma rule is apparently based, namely that the prosecution has the right, under the adversary system, to conceal its cards until played, as in a poker game, has been considerably undermined in recent years. See e.g., Wardius v. Oregon, 412 U.S. 474 (1973); Williams v. Florida, 399 U.S. 78, 82 (1970). But even if pre-trial discovery of a defendant's statements as recorded by the police is not

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* Only sworn statements taken by the State are subject to inspection. O.S. 22 §749.

required by due process,* denial of access to those statements at the trial, when the witness is being cross-examined, can serve no valid state purpose sufficient to justify the interference with the right to confrontation.

Oklahoma's mechanical application of its work product doctrine to prevent disclosure of notes on the admissions of one accused of a capital crime fails to satisfy due process requirements. See Chambers v. Mississippi, 410 U.S. 284 (1973); Green v. Georgia, 442 U.S. 95 (1979). Refusing to provide access to such written notes also violates the principles underlying Miranda v. Arizona, 384 U.S. 436 (1966) and its progeny. Application of the work product privilege to unsworn statements by defendants in criminal proceedings fosters unreliable confessions and police misconduct. Where, as in this case, the only written evidence of these extra-judicial statements is within the exclusive control of the prosecution, there is no way to ensure that the police testimony is accurate. Indeed, Sheriff Ingram himself gave different versions of the statement at the preliminary hearing, at the motion to suppress, and at trial. The importance of permitting counsel to inspect the contemporaneous notes thus cannot be overestimated.

Finally, failure to disclose notes of a defendant's admissions, in a capital trial, runs afoul of this Court's insistence that the decision to condemn a man to die be made with

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* Under some circumstances, such discovery may indeed by constitutionally required. See e.g., Clewis v. Texas, 386 U.S. 707, 712 n.8 (1967); Cicenia v. Lagay, 357 U.S. 504, 510-11 (1958); Leland v. Oregon, 343 U.S. 790, 801-02 (1952).

the utmost care and after giving the defendant every opportunity to present mitigating circumstances. Lockett v. Ohio, 438 U.S. 586 (1978). Petitioner's inability to counter the State's most recent version of his statements by reference to earlier written notes cannot be squared with the heightened reliability required in making capital sentencing decisions. See Gardner v. Florida, 430 U.S. 349 (1977).

IV

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE DEATH SENTENCE IMPOSED ON PETITIONER, A NINETEEN YEAR OLD WITH NO PRIOR RECORD WHOSE PARTICIPATION IN THE CRIME WAS RELATIVELY SLIGHT, VIOLATED THE EIGHTH AMENDMENT WHEN IT WAS BASED ON THE SINGLE, QUESTIONABLE AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS "ESPECIALLY CRUEL" AND WHEN IT MAY HAVE BEEN ARRIVED AT AFTER UNDUE COERCION.

Petitioner has been condemned to die notwithstanding at least four compelling circumstances which should have removed him from consideration for the ultimate penalty. First, his death sentence was imposed for a crime in which, according to the evidence at trial, he was implicated only as an accomplice. Petitioner personally did not kill, intend to kill, or attempt to kill. See Enmund v. Florida, 102 S.Ct. 3368 (1982). Second, his death sentence was imposed based on the single aggravating factor that the killing was "especially cruel," despite the fact that the victim was rendered unconscious immediately, and accordingly the case did not satisfy even the minimal narrowing construction given to this aggravating circumstance by the Oklahoma Court of Criminal Appeals. See Godfrey v. Georgia, 446 U.S. 420 (1980). Third, petitioner's sentence was rendered by a jury after completely inadequate and confusing instructions about what role the aggravating and mitigating circumstances must play in their sentencing deliberations. See Eddings v. Oklahoma, 455 U.S. 104 (1982). And finally, the sentence may have been agreed to only after a coercive note was sent to a jury that had been deliberating at the penalty phase for an entire day. See Smith v. State, 659 P.2d at 341 (Brett, J., dissenting in part). Each of these

objections, standing alone, would serve to cast grave doubt on the propriety of petitioner's death sentence. In combination, they require that the sentence be vacated.

As detailed more extensively in Point I above, the evidence at trial failed utterly to show that petitioner had participated in setting the fire that killed the victim. Even if the evidence were sufficient, however, to hold petitioner responsible, as a principal, for the acts of Ralph Coforth,* such vicarious responsibility cannot serve as the basis for imposing a death sentence on petitioner. See Enmund v. Florida, 102 S.Ct. 3368. Petitioner's sentence was not tailored to his own personal responsibility and moral guilt, therefore it must be modified to life imprisonment. Id. at 3378.

Petitioner's death sentence is the first to have been affirmed based solely on Oklahoma's fourth aggravating circumstance, that the offense was "especially heinous, atrocious or cruel."** The cursory and often inconsistent analysis of this provision by the Oklahoma Court of Criminal Appeals has not served to define with any degree of clarity how killings falling within

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* The appellate court affirmed petitioner's conviction, after conceding that he might not have had the necessary mens rea, by applying Oklahoma's law on accessory liability. O.S. 21 §172 (set forth in Appendix C). The jury had not been instructed on this law.

** The jury stated in their verdict only that the killing was "cruel" (T. 287).

its ambit can be distinguished from all other murders. For example, a killing by one shot at point blank range was held to be especially heinous, atrocious or cruel in Eddings v. State, 616 P.2d 1159 (Okl. Cr. 1980), rev'd on other grounds sub nom. Eddings v. Oklahoma, 455 U.S. 104 (1982), but not especially heinous, atrocious or cruel in Odum v. State, 651 P.2d 686 (Okl. Cr. 1982). In petitioner's case, the prosecutor conceded that no evidence had been presented to show that the victim suffered any pain from the fire, since he may well have been unconscious before it was set (T. 278-79). The jury may well have been influenced in its decision by the gruesome appearance of the scene in the numerous photographs admitted into evidence. But the fact that a homicide created a particularly ugly picture cannot, in Oklahoma as in Georgia, justify imposition of the death penalty. See Godfrey v. Georgia, 446 U.S. at 433, n. 16.

Against this questionable aggravating factor, the jury should have been required to weigh the significant mitigating circumstances of petitioner's youth, his lack of any prior criminal record, his relatively minor role in the crime, and the possibility that his criminal responsibility was diminished by intoxication. But the jury was given no guidance whatever as to how to perform this task. The court merely listed eight "minimum mitigating" factors and told the jurors they could not impose the death penalty if it found the aggravating circumstance(s) outweighed by one or more mitigating circumstances (Stage Two Instructions # 5 and 6). The absence of any explanation of the balancing process, together

with use of the term "minimum" mitigating circumstances, left the jury wholly in the dark as to what factors it was required to consider in mitigation, see Eddings v. Oklahoma, 455 U.S. 104 (1982), and what weight should appropriately be given to such factors.

The final aspect of petitioner's sentencing proceeding, involving the possibility that the judge sent the jury a second note, after the first note telling them they could not sentence petitioner to life without parole,* warning the jurors that unless they returned with a verdict in ten minutes, a life sentence would be imposed, is perhaps the most troubling. The existence of such a second note was denied by the appellate court, Smith v. State, 659 P.2d at 336, but petitioner had made a strong enough showing that it had been sent to convince the dissenting judge that petitioner's sentence should be modified to life imprisonment. Id. at 338 (Brett, J., dissenting). Denial of even a hearing at which one or more of the jurors could have been questioned failed to satisfy constitutional requirements of reliability in capital sentencing. The continuing possibility that this highly prejudicial note was sent is contrary to this Court's position that:

> It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.

Gardner v. Florida, 430 U.S. 349, 359 (1977) (emphasis supplied).

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* The propriety of this response may also be in question. See People v. Ramos, 30 Cal 3d 553, 639 P.2d 908 (1982), cert. granted, October 4, 1982.

V.

THIS COURT SHOULD REVERSE PETITIONER'S DEATH SENTENCE SUMMARILY ON THE GROUND THAT OKLAHOMA HAS FAILED CONSISTENTLY TO ADHERE TO THE REQUIREMENTS OF WITHERSPOON V. ILLINOIS BY APPROVING, IN PETITIONER'S CASE AS IN MANY OTHERS, THE EXCLUSION OF JURORS WHO MERELY VOICED GENERAL OBJECTIONS TO THE DEATH PENALTY.

The Oklahoma Court of Criminal Appeals has never reversed a death sentence on Witherspoon grounds. No matter how much the trial judge deviated from the questions approved by this Court in Witherspoon v. Illinois, 391 U.S. 510 (1968), the appellate court has invariably held that the jurors were properly excluded based on their often tentative, equivocal answers. See e.g. Davis v. State, ___ P.2d ___ (Okl.Cr., Slip op. No. F-78-140 and 141, May 9, 1983)*; Chaney v. State, 612 P.2d 269 (Okl.Cr. 1980); Rowbotham v. State, 542 P.2d 610 (Okl.Cr. 1975). Since petitioner was tried and sentenced by a jury from which several veniremen were excluded merely for voicing general opposition to the death penalty, as though Witherspoon had never been decided by this Court, his death sentence should be summarily reversed.

Three veniremen were excused after merely announcing that they did not believe in the death penalty (Allton: V. 27, Sheaffer and Arnold: V. 47). No further inquiry was made to determine whether their beliefs were such as to require their excusal under Witherspoon. Three others were successfully challenged for cause by the State after they tentatively agreed that their beliefs might prevent them from delivering a guilty verdict (Prather: V.22, Frogue: V. 23 and Hunnicutt: V.26-27). These responses were inadequate under Maxwell v. Bishop, 398 U.S. 262, 264 (1970).

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* The relevant portions of this as yet unreported opinion are annexed as Appendix D.

Two additional veniremen were excluded for asserting that the possibility of a death sentence would make the decision more difficult, or might affect the guilt finding process (Rollins: V.24 and Atkinson: V.23). Their exclusion violated this Court's decision in Adams v. Texas, 448 U.S. 38, 50-51 (1980).

The decision by the Oklahoma Court of Criminal Appeals to affirm petitioner's death sentence despite the blatant violations of Witherspoon is entirely in keeping with that court's treatment of challenges to the excusal of death-scrupled jurors. In its most recent opinion, the court, one judge dissenting, affirmed a death sentence despite the concededly "ambiguous, hesitant and equivocal" answers of three veniremen to a trial judge's insistent, yet confusing, inquiries. Davis v. State, (Slip op. No. F-78-140, at p.8, May 9, 1983). Rather than requiring, in accordance with Witherspoon, that a juror assure the court that he would automatically vote against the death penalty, or that his opinion about capital punishment would prevent him from returning a guilty verdict, the Oklahoma court seems to require the venireman's unhesitating, unambiguous expression of willingness to impose the ultimate penalty. See also Chaney v. State, 612 P.2d 269, 274 (1980); Justus v. State, 542 P.2d 598, 607 (1975); Gibson v. State, 501 P.2d 891 (1972); Koonce v. State, 456 P.2d 549, 556 (1969). A jury selected according to Oklahoma's interpretation of Witherspoon is one "uncommonly willing to condemn a man to die." Witherspoon v. Illinois, 391 U.S. at 521. Petitioner's death sentence must be reversed.

CONCLUSION

For the above-stated reasons, petitioner prays that a writ of certiorari be granted.

Respectfully submitted,

May 26, 1983

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APPENDIX A

Brett, J., concurred in part and dissented in part and filed opinion.

1. Criminal Law ⇐586(1)

Where testimony of hospitalized officer would have added little, if anything, to evidence adduced concerning legality of defendant's arrest, trial court in suppression hearing did not abuse its discretion in refusing to grant continuance.

2. Criminal Law ⇐566

Decision to grant continuance lies within discretion of trial court.

3. Criminal Law ⇐535(2)

Corroborative evidence need not, independent of confession, be sufficient to establish corpus delicti beyond reasonable doubt in murder prosecution.

4. Criminal Law ⇐517.3(3)

Once substantial evidence of corpus delicti is introduced, defendant's confession is admissible in murder prosecution, if together they provide basis for finding of both corpus delicti and defendant's guilt beyond a reasonable doubt.

5. Criminal Law ⇐517.3(4)

Evidence independent of defendant's confession, including medical examiner's report which concluded that murder victim died from smoke and/or fire inhalation, photographs of charred body and pickup camper which indicated that victim's belongings had been rummaged through and strewn about behind pickup and pictures of tools belonging to victim which were partially buried in sand short distance from pickup, all of which established that victim met unnatural and violent death and that indicia of foul play abounded, was sufficient to meet "substantial evidence" test to permit introduction of confession for purposes of proving corpus delicti and defendant's guilt.

6. Homicide ⇐230

Evidence which revealed that murder victim was beaten, that his pickup truck was set ablaze, that defendant was present throughout entire episode and that defend-

Larry Dean SMITH, Appellant,

v.

The STATE of Oklahoma, Appellee.

No. F-78-331.

Court of Criminal Appeals of Oklahoma.

Feb. 10, 1983.

Defendant was convicted before the District Court of Ottawa County, Sam C. Fullerton, J., of murder in the first degree and was sentenced to death, and he appealed. The Court of Criminal Appeals, Bussey, P.J., held that: (1) trial court did not err in overruling motion for continuance, (2) evidence permitted introduction of defendant's confession for purposes of proving corpus delicti and defendant's guilt, (3) evidence was sufficient to find intent, (4) instruction on murder in the second degree was not warranted, (5) admission of certain photographs was not error, (6) defendant failed to establish claim that prosecutor wore firearm into courtroom or that jury may have seen such firearm, and (7) leniency given by other jury to younger codefendant for participation in crime at issue did not render death penalty inappropriate in defendant's case.

Affirmed.

ant, and his accomplice fled from location, knowing that victim was lying in camper part of burning pickup, justified jury in concluding that defendant intended to effect victim's death.

7. Homicide ⇐354

Death sentence imposed on defendant in first-degree murder prosecution was not excessive in relation to his role in effecting death of victim, who, after beating, was left lying in camper part of pickup which was then set ablaze.

5. Homicide ⇐309(3)

Since evidence in prosecution for murder in the first degree, that defendant and his accomplice rode away from scene, leaving victim lying in back of burning pickup, did not suggest passive disregard to victim's life, but rather active intention that he should die, jury instruction on murder in the second degree was not warranted.

9. Jury ⇐108

Eleven prospective jurors, ten of whom said they could not return verdict of guilty of first-degree murder and other of whom said he could vote for guilty, but could not impose death penalty, were properly excused.

10. Jury ⇐142

Error in excusing jurors must be raised by objection, lest it be waived.

11. Criminal Law ⇐438(1)

Whenever photograph is faithful reproduction of that which it purports to reproduce and is probative, it is admissible for whatever value it may have to jury.

12. Criminal Law ⇐438(1)

Photographs which are principally designed to appeal to jury's emotions rather than to prove fact are not admissible.

13. Criminal Law ⇐438(2, 5)

In prosecution for first-degree murder, photographs showing eight different views of burned truck, two photographs of motorcycle ridden by defendant and accomplice and two views of victim's body lying inside camper shell of burned pickup were not erroneously admitted, since, as such photographs had little emotional content, danger of prejudice was low.

14. Criminal Law ⇐660

Where defendant failed to timely object to presence of officers in courtroom during trial, error was waived.

15. Criminal Law ⇐1119(4)

Disputed record did not support conclusion that prosecutor displayed to jury pistol allegedly worn by him during trial.

16. Criminal Law ⇐911, 1156(1)

Decision to grant new trial rests in discretion of district court, and Court of Criminal Appeals will not reverse absent abuse of discretion.

17. Criminal Law ⇐664

Where record reflected that defense attorney was aware of trial judge's answer by note to jury's question, instead of calling them into open court to answer question, trial court's actions complied with purpose and intent of statute governing procedure to be followed if jury, after retiring for deliberation, desires to be informed on point of law arising in cause. 22 O.S.1981, § 894.

18. Criminal Law ⇐1039

Where defendant made no objection to either form or content of judge's answer by note to jury's question during deliberations on sentencing, any right to allege error on appeal was waived. 22 O.S.1981, § 894.

19. Criminal Law ⇐956(4)

Absent evidence of existence of note allegedly sent by trial court to jury telling them that if they did not reach a verdict within ten minutes he would discharge them and impose life sentence, Court of Criminal Appeals could not invoke rule that where record necessary for review is lost or destroyed at no fault of defendant and cannot be substituted, new trial will be granted.

20. Criminal Law ⇐641.13(1)

Where standard for evaluating effectiveness of counsel in State at time of defendant's trial was "farce or mockery of justice" test, Court of Criminal Appeals

would gauge performance of defendant's trial counsel on such basis.

21. Criminal Law ⇐641.13(6)

Defendant in prosecution for first-degree murder received effective assistance of counsel where defense counsel vigorously cross-examined witnesses for State and adequately defended defendant in face of strong evidence of his guilt, notwithstanding that he did not introduce evidence after State had rested.

22. Criminal Law ⇐641.13(1)

"Effective assistance of counsel" does not mean victorious or flawless counsel.

See publication Words and Phrases for other judicial constructions and definitions.

23. Criminal Law ⇐1134(8)

Death penalty statute requires Court of Criminal Appeals on consideration of appropriateness of death penalty to determine whether sentence was imposed under influence of passion, prejudice or other arbitrary factor, whether record supports finding of aggravating circumstance and whether application of death penalty in particular case is excessive or disproportionate when compared to results of other cases. 21 O.S.1981, § 701.13.

24. Homicide ⇐354

Where murder victim was beaten into helplessness and left in bed of pickup truck and truck was then set on fire, jury was justified in finding that killing was especially heinous, atrocious or cruel. 21 O.S. 1981, § 701.13.

25. Criminal Law ⇐983

Fact that another jury gave leniency to defendant's younger codefendant for his participation in first-degree murder did not detract from persuasiveness of evidence adduced against defendant, providing sufficient justification for imposition of death penalty. 21 O.S.1981, § 701.13.

An Appeal from the District Court of Ottawa County, Sam C. Fullerton, District Judge.

Larry Dean Smith, appellant, was convicted of Murder in the First Degree in the District Court of Ottawa County, Oklahoma, Case No. CRF-77-677. He was sentenced to death and appeals. AFFIRMED.

Joseph E. Mountford, Miami, for appellant.

Jan Eric Cartwright, Atty. Gen., Susan Talbot, Chief, Appellate Criminal Div., State of Oklahoma, Oklahoma City, for appellee.

OPINION

BUSSEY, Presiding Judge:

The appellant, Larry Dean Smith, was tried before a jury and convicted in the District Court of Ottawa County, Oklahoma, Case No. CRF-77-677, of Murder in the First Degree. He was sentenced to suffer the penalty of death, and appeals.

The charges and conviction stem from the death of Willard Denning, whose charred body was found in the back of his burned pickup camper on September 6, 1977. The camper was parked at a chat dump in Picher, Oklahoma. The appellant admitted subsequent to his arrest that he was present at the time the pickup was set ablaze, but maintained he did not participate in the murder. This statement was introduced into evidence at trial.

The appellant argues thirteen points of error on appeal. We shall consider the allegations in a different order than presented us in the briefs.

[1, 2] The appellant alleges the trial court erred in overruling his motion for a continuance.

In his attempt to suppress both the confession he had given the police and the evidence obtained from the seizure of the motorcycle he had been riding the day of the murder, the appellant subpoenaed the arresting officer. The officer was hospitalized, and was required to remain there for an indefinite period of time. He was thus unable to appear as a witness, and the appellant moved for a continuance.

The trial court denied the appellant's motion on the grounds that the appellant had already entered a plea to the charge without objection, thereby waiving his right to object to an unlawful arrest. *Stone v. State*, 461 P.2d 962 (Okl.Cr.1969); *Miles v. State*, 416 P.2d 964 (Okl.Cr.1966).

The appellant argues that his plea prior to objecting to the legality of his arrest should not be used to deny his right to present witnesses concerning matters other than his arrest. We note, however, that the arresting officer was not present when the appellant gave his confession. Officers who assisted in the seizure of the motorcycle and who obtained the appellant's confession did testify during an in camera hearing on the appellant's motion to suppress the confession and motorcycle. The missing officer's testimony would have added little, if anything, to the evidence adduced concerning these matters. The decision to grant a continuance lies within the discretion of the trial court. *Lemmon v. State*, 538 P.2d 596 (Okl.Cr.1975). We find no abuse of that discretion in this case.

[3, 4] Next, the appellant argues the State failed to establish the corpus delicti of the murder independent of the confession at both the preliminary hearing and the trial.

As we stated in *Jones v. State*, 555 P.2d 63 (Okl.Cr.1976) and the cases cited therein, corroborative evidence need not, independent of a confession, be sufficient to establish the corpus delicti beyond a reasonable doubt. Once substantial evidence of the corpus delicti is introduced, a defendant's confession is admissible, if together they provide a basis for a finding of both the corpus delicti and the defendant's guilt beyond a reasonable doubt.

[5] In the present case, evidence independent of the appellant's confession produced by the State included the medical examiner's report, which concluded Denning died from smoke and/or fire inhalation, photographs of the charred body and pickup camper, which photographs also indicated that Denning's belongings had been rummaged through and strewn about behind the pickup, and pictures of tools belonging to Denning which were partially buried in the sand a short distance from the pickup.

This evidence established that Denning met an unnatural and violent death, and that indices of foul play abounded. It sufficiently met the "substantial evidence" test described above to permit the introduction of the confession for purposes of proving the corpus delicti and the appellant's guilt. See, *Goforth v. State*, 644 P.2d 114 (Okl.Cr. 1982). The trial court properly overruled the appellant's demurrers at the preliminary hearing and the trial.

The appellant's next two assignments of error concern his intent to cause Denning's death.

[6, 7] Initially, he argues that the trial court should have directed a verdict of Not Guilty in the trial, because the State failed to prove he possessed the requisite intent to constitute murder in the first degree. Evidence adduced at trial revealed that the appellant and his accomplice, Ralph Goforth, rode a motorcycle to a chat dump in Picher, Oklahoma, where Denning was camped, that Denning was beaten, that the appellant and Goforth rummaged through Denning's belongings with intent to rob him of his possessions, that they tried to steal Denning's pickup, but were unsuccessful in their attempts to start it, that the pickup was then set ablaze, and that the appellant and Goforth fled from the location, knowing that their beaten victim was lying in the camper part of the burning pickup.

The events surrounding this gruesome deed clearly provide sufficient indication of the appellant's intention to effect Denning's death.

The appellant's testimony, if believed, would establish that his accomplice beat Denning and set the truck on fire without the appellant's aid, thereby inferring he lacked the necessary mens rea to commit murder in the first degree. Nonetheless, the appellant was present throughout the

entire episode. He voluntarily left the scene, knowing that, in all likelihood, Denning would be engulfed in the flames of the burning vehicle and annihilated thereby. The appellant's participation in the crime rendered him a principal under our laws.[1] He is therefore subject to the same charges and punishment as though he had committed the murder himself.[2] The jury was justified in its conclusion from the facts and circumstances surrounding the appellant's actions that he intended to effect Denning's death. *Clouse v. State*, 389 P.2d 1002 (Okl.Cr.1964).

[8] The appellant's argument that the trial court should have instructed on murder in the second degree presents the same issue of intent. The requested instruction was,

> You are instructed that homicide is murder in the second degree when perpetrated by an act imminently dangerous to another person and evidencing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual.

As stated above, when the appellant and his accomplice rode away from the scene, leaving Denning lying in the back of a burning pickup, they must have known he would not live. The evidence clearly does not suggest a passive disregard for Denning's life, but rather an active intention that he should die. The instruction on murder in the second degree was not warranted. *Parks v. State*, 651 P.2d 686 (Okl.Cr.1982).

In his next assignment of error, the appellant alleges the voir dire did not conform to the requirements of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

In *Chaney v. State*, 612 P.2d 289 (Okl.Cr.1980), we noted that *Witherspoon* permits a juror to be excused for cause if the juror's opposition to the death penalty is so great that the juror would refuse to return a verdict of guilty where it was warranted, due to the possibility of the death penalty being imposed, or is so strong that the juror had decided in advance not to impose the death penalty, regardless of the facts of the case. It appears from the transcript of the voir dire that the appellant was under the impression that only the former of these was a legitimate ground, because each time a question was asked regarding the imposition of punishment, he objected. The trial court properly overruled the objections. *Witherspoon*, *supra*.

[9] Fourteen prospective jurors were excused because of their objections to the death penalty.[3] The appellant specifically mentions three on appeal.[4,5]

1. Title 21 O.S.1981, § 172 states:
> All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, are principals.

2. We note in this regard that we must examine the penalty meeted the appellant for his role in this case in light of the recent case of *Enmund v. Florida*, — U.S. —, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). In that case, the Supreme Court held that the Eighth and Fourteenth Amendments to the Constitution prohibited the imposition of the penalty of death on a principal in a felony murder who was neither present nor intended any killings to take place during the commission of the crime which he had helped plan.
> We find *Enmund* distinguishable from the present case. The appellant must have known the consequences of leaving a badly beaten man lying inside a burning pickup truck in a deserted chat dump. It is obvious to this Court that the appellant intended to visit death upon his victim. We do not find the appellant's sentence to be excessive in relation to his role in effecting Denning's death. *Enmund*, *supra*.

3. Ms. Prather, Ms. Prague, Mr. Rollins, Mr. Hunnicutt, Mr. Allton, Mr. Atkinson, Ms. Woodrome, Ms. Garrett, Ms. Duree, Mr. Boyer, Mr. Pollock, Ms. Brooks, Ms. Kluder, Ms. Cook. A fifteenth prospective juror, Mr. Gowin, said he was opposed to the death penalty, but he could return a verdict of guilty. He was seated.

4. Ms. Prather, Mr. Rollins, Mr. Hunnicutt.

5. Of the eleven persons who were excused but not mentioned by the appellant, ten said they could not return a verdict of guilt and the other said he could vote for guilt, but could not impose the death penalty. All were properly excused under *Witherspoon*.

[10] The appellant did not object to the excusing of any of the three.[6] As we stated in *Hays v. State*, 617 P.2d 223 (Okl.Cr.1980), error of this nature must be raised by objection, lest it be waived.

[11-13] The next assignment of error relates to the photographs that were admitted. There were eight different views of the burnt truck, two photographs of the motorcycle the men were riding, and two views of the body lying inside the camper shell of the pickup. Whenever a photograph is a faithful reproduction of that which it purports to reproduce and is probative, it is admissible for whatever value it may have to the jury. *Pate v. State*, 361 P.2d 1086 (Okl.Cr.1961). Photographs which are principally designed to appeal to the jury's emotions, rather than to prove a fact, are not admissible. *Pate v. State*, supra; *Vierrether v. State*, 583 P.2d 1112 (Okl.Cr.1978). In the present case, however, the danger of prejudice was low, as the photographs have little emotional content. The assignment of error is without merit.

The appellant's next assignment of error concerns the conduct of the prosecutor. The appellant claims that the prosecutor stationed several uniformed police officers about the courtroom, and that the prosecutor himself wore a firearm throughout the trial.

[14] The appellant failed to object to the presence of the officers in the courtroom. Having so failed to make a timely objection, the error was waived. *Hart v. State*, 535 P.2d 302 (Okl.Cr.1975).

[15, 16] There was also no objection to the prosecutor's firearm, if one was indeed worn into the courtroom. However, since it is possible, according to appellant's theory, that the jury saw the weapon and the appellant did not (once again, assuming arguendo that the prosecutor wore one), we shall more fully address the issue.

Testimony concerning the pistol was presented at the hearing on the motion for a new trial. The appellant's witness, an attorney who also signed an affidavit, stated that he had been told by the prosecutor that the prosecutor had received threats prior to the trial and that the prosecutor carried a pistol at all times. The witness did not see the prosecutor wear the weapon into the courtroom, nor did he see it displayed in the courtroom, but thought the jury may have seen it.

On the other hand, the State presented testimony that the prosecutor checked his gun to his secretary prior to going into court; and that, in any event, the holster was situated in such a position on his hip that it was covered at all times by his coat, and not visible to the jury.

The appellant has failed to sufficiently establish his claim. The disputed record will not support a conclusion that the prosecutor displayed a pistol to the jury. As the decision to grant a new trial rests within the discretion of the district court, we will not reverse that decision absent abuse of the discretion. *Lemmon v. State*, 538 P.2d 596 (Okl.Cr.1975). We find no such abuse.

[17, 18] During the deliberations on sentencing, the jury sent a note to the trial court asking whether they could recommend a life sentence without parole. The judge replied that such a recommendation would not be binding. In his next assignment of error the appellant maintains that the judge's answer led the jury to believe that only a sentence of death would be acceptable, and that it was reversible error for the court to send the jury a note instead of calling them into open court to answer their question, in accordance with 22 O.S. 1981, § 894.[7]

6. Although the appellant was granted a "continuing objection" to the form and substance of the questions asked by the trial court, such an objection did not cover the issue of the improper dismissal. The issue is whether the trial court was justified in dismissing the veniremen without further pursuing their answers to determine whether the jurors fell under one of the two *Witherspoon* exceptions.

7. Title 22 O.S.1981, § 894 states:

> After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony or if they desire

In *Boyd v. State*, 572 P.2d 276 (Okl.Cr.1977), we stated that the purpose of Section 894 was to prevent communications from being made to the jury without the parties being present to protect their interests. In the instant case, the record reflects that the defense attorney was aware of the judge's answer and specifically agreed to it. (Tr. 295-296). Thus, the trial court's actions complied with the purpose and intent of Section 894. In addition, the appellant made no objection to either the form or content of the judge's answer. Therefore, any right to allege error on appeal was waived. *Gaines v. State*, 568 P.2d 1250 (Okl.Cr.1977); *Choate v. State*, 476 P.2d 384 (Okl.Cr.1970).

[19] The appellant also argues that the trial court sent the jury a note telling them that if they did not reach a verdict within ten minutes he would discharge them and impose a life sentence. The only support of this assertion to be found in the record is an affidavit of the appellate attorney. At the hearing on the motion for new trial, the judge who presided over the appellant's trial stated into the record that he did not send such a note.

The appellant maintains in his supplemental brief that, the judge's statement notwithstanding, such a note did indeed exist, which, to his prejudice, has been lost. He speculates that the note allegedly written and sent to the jury effectively suggested that the judge believed the appellant should receive the death penalty.

The appellant cites *Thurman v. State*, 78 Okl.Cr. 98, 144 P.2d 125 (1943), and *Avants v. State*, 544 P.2d 539 (Okl.Cr.1975) for the proposition that where the record necessary for review is lost or destroyed, at no fault of a defendant, and cannot be substituted, a new trial will be granted. However, to find these cases controlling in the present requires that we agree with the appellant upon the preliminary question of whether the note indeed ever existed. This we cannot do.

The facts in this case simply do not bear the appellant's contention out. Although we believe the argument is made in good faith, we cannot accept it, in light of the lack of evidence of the existence of the note. It would be a dangerous practice for us to accept wholesale the assertions of appellate counsel in these situations. The frivolity and spuriousness of the appeals which could be perpetuated by such a philosophy would be bridled only by counsel's imagination. The assignment of error cannot stand.

[20] The appellant alleges in his supplemental brief he was denied effective assistance of counsel. The standard for effectiveness of counsel in this State at the time of appellant's trial was the "farce or mockery of justice" test. We shall thus gauge the performance of appellant's trial counsel on that basis, although we note that our decision would be the same were we to apply the "reasonably competent assistance of counsel test" established in *Johnson v. State*, 620 P.2d 1311 (Okl.Cr.1980).

[21, 22] Having fully reviewed the record, we are convinced that the appellant received effective assistance of counsel. Effective assistance of counsel does not mean a defendant must have received victorious or flawless counsel. *Davison v. State of Oklahoma*, 428 F.Supp. 34 (W.D.Okl. 1976). It is not uncommon for defense counsel to not introduce evidence after the State has rested. Thus, counsel's failure to do so in the instant case does not of itself constitute ineffective assistance. Trial counsel for the appellant vigorously cross-examined witnesses for the State and adequately defended the appellant in the face of strong evidence of his guilt. The assignment of error is meritless.

[23] The final three assignments may be joined with our consideration of the appropriateness of the death penalty as required

to be informed on a point of law arising in the cause, they must require the officer to conduct them into court. Upon their being brought into court, the information required must be given in the presence of, or after notice to the district attorney and the defendant or his counsel, or after they have been called.

by 21 O.S.1981, § 701.13. The ninth assignment is that the State failed to prove the aggravating circumstance beyond a reasonable doubt; the tenth is that there was an accumulation of error resulting in prejudice to the defendant; and the final assignment is that the sentence is excessive. The statute requires this Court to determine whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factor, whether the record supports the finding of the aggravating circumstance, and whether the application of the death penalty in this particular case is excessive or disproportionate when compared to the results of other cases.

A careful consideration of the record leads this Court to conclude that the remaining assignments of error are without merit, and the statutory questions must be answered in the negative. The defendant received a fair and impartial trial. He was ably represented by counsel, and there was no prejudicial evidence or testimony improperly admitted against him. The jury was properly instructed concerning the findings it was required to make before it could return a verdict of guilt and before it could impose the death penalty.

[24] The only aggravating circumstances given the jury was that the crime was especially heinous, atrocious or cruel. The instruction defining that circumstance was similar to the one approved in *Chaney v. State*, supra. Looking at the crime in the light of that instruction, we hold the jury was justified in finding that the killing was especially heinous, atrocious or cruel. The victim was beaten into helplessness and left in the bed of his pickup truck, and the truck was then set on fire. He died from the inhalation of flames and smoke. It is clear that the defendant either intended to inflict a high degree of pain or else he was utterly indifferent to his victim's suffering. See, *Eddings v. State*, 616 P.2d 1159 (Okl.Cr. 1980), at 1167-1168.

[25] We cannot overlook the fact that the appellant's co-defendant, Ralph Goforth, who was tried before a separate jury, received a penalty of life imprisonment. See, *Goforth v. State*, 644 P.2d 114 (Okl.Cr. 1982). The evidence against Goforth was as strong as that against the appellant. Indeed, Goforth and the appellant each identified the other as the main culprit. See *Goforth*, supra. The crucial distinguishing factor between Goforth's penalty and that which the appellant received is the fact that Goforth was sixteen years of age when the murder was committed, whereas the appellant was nineteen. Obviously the jury in Goforth's case considered his age to be a persuasive mitigating factor. In the appellant's case, no such determination was made.

We do not allow the punishment given the appellant's co-defendant to persuade us that the penalty of death is inappropriate in the appellant's case. The facts and circumstances of this case provide a sufficient justification for imposition of the death penalty. The fact that another jury gave leniency to the appellant's younger co-defendant for his participation in this crime does not detract from the persuasiveness of the evidence adduced against the appellant.

The murder in this case is comparable to *Parks v. State*, 651 P.2d 686 (Okl.Cr.1982), wherein we affirmed the death sentence imposed for the defendant's murder of a service station attendant; *Jones v. State*, 648 P.2d 1251 (Okl.Cr.1982), wherein we affirmed the death sentence imposed upon the defendant for murdering a man in a tavern; *Hays v. State*, 617 P.2d 223 (Okl.Cr.1980), in which we held the defendant's act of shooting a shoe store owner twice in the head during a robbery justified the sentence of death; *Eddings v. State*, 616 P.2d 1159 (Okl.Cr.1980) 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) (remanded for resentencing), wherein, the defendant's youth notwithstanding, we determined the death penalty was appropriate punishment for the murder of an Oklahoma Highway Patrolman; and *Chaney v. State*, 612 P.2d 269 (Okl.Cr.1980), in which we affirmed the death sentence imposed for the defendant's murder of two women. We also note that the present case is unlike the recent case of *Odum v. State*, 651 P.2d 703 (Okl.Cr.1982) in

which we modified the defendant's death sentence to life imprisonment because the facts of the case did not support the aggravating circumstance that the murder was especially heinous, atrocious and cruel. In this case, the beaten victim was left inside a camper and set afire. The autopsy of the victim's charred remains revealed the presence of soot in the victim's lungs, which indicated that he had inhaled fire and smoke before his demise.

We have also compared this case to other capital cases which have been modified to life or reversed for other reasons.[8]

The sentence is not disproportionate to the crime. Accordingly, the judgment and sentence is AFFIRMED.

CORNISH, J., concurs.

BRETT, J., concurs in part and dissents in part.

BRETT, Judge, concurs in part and dissents in part:

I concur that the conviction in this case should be affirmed, but I dissent to the death penalty under the facts of this particular case. I would modify the sentence to life imprisonment.

The facts of this case reflect that the conviction was premised upon the confession of appellant. In his confession he relates that his co-defendant, Goforth, beat the deceased and set fire to the truck. In short, as the majority opinion relates, each defendant laid the blame on the other for the beating and for setting the truck on fire. The heinous nature of the crime cannot be questioned. The deceased was left to burn to death, even though in an unconscious condition. Admittedly, another jury found Goforth guilty and assessed a life sentence upon him. And, it is established law that an aider and abettor is treated the same as a principal. But, when the conviction is left to such an uncertain state as the instant case, the death sentence causes me some concern.

Referring to the trial court's answer to the jury's first question:

> Your Honor, we the jury would like to know if the law will permit us, the jury, to recommend life in prison without parole. Thank you.

The trial judge responded:

> You may make such a recommendation but it is not binding on the court. The court has no authority to incorporate such recommendation on its judgment and sentence.

Admittedly, trial counsel did not object to the court's answer to the question. Ordinarily such failure to object constitutes waiver. It would have been better had the judge refused to answer the jury's question. Or, had the court stopped his answer at the end of the first sentence, no prejudice could have been claimed whether objected to or not.

In a First Degree Murder trial, when the jury is qualified to assess the death penalty, the court should be most cautious and follow the statutory provisions with certainty. Had the provisions of 22 O.S.1971, § 894 been followed precisely, no question would probably exist.

With reference to the second note allegedly sent to the jury, the affidavit of appellate counsel recites, in part, the following:

> That as such he [appellate counsel] was taking civil depositions in the District Courtroom No. 1, between 4:00 p.m. and 5:10 p.m., the attorneys and the court reporters were informed that we would have to clear the Courtroom, as the jury in the case of *State of Oklahoma vs. Larry Dean Smith*, had reached a sentence and would shortly return to the Courtroom.
>
> I immediately left the Courtroom and went to the chamber door of the Honorable Sam C. Fullerton, Judge, where, thereupon, I was informed by the District Judge that he had sent a note in to the

8. *Hall v. State*, 650 P.2d 893 (Okl.Cr.1982); *Brewer v. State*, 650 P.2d 54 (Okl.Cr.1982); *Burrows v. State*, 640 P.2d 533 (Okl.Cr.1982); *Franks v. State*, 636 P.2d 361 (Okl.Cr.1981); *Irvin v. State*, 617 P.2d 588 (Okl.Cr.1980); *Hagar v. State*, 612 P.2d 1388 (Okl.Cr.1980).

jury instructing them that if they did not reach a sentence within ten minutes that he would call them back into the Courtroom, discharge them, and then he would pronounce a life sentence. I then looked surprised, and the District Judge stated "That's what the law provides."

The alleged second note was never found in the record and does not appear in the record before this Court. But, counsel argued the matter at the hearing on the Motion for New Trial. Judgment and sentence had already been imposed when the motion for new trial was heard.

The hearing concerning the alleged note went as follows:

THE COURT: Now, Mr. Mountford, you have made some allegations in your affidavit or some statements concerning a note?

MR. MOUNTFORD: Yes.

THE COURT: That you were told that I had sent to the jury.

MR. MOUNTFORD: Yes.

THE COURT: Advising them that if they didn't return with a verdict within 10 minutes that I would bring them back in and discharge them and impose a life sentence?

MR. MOUNTFORD: That's right, Your Honor.

THE COURT: I would like for the record to reflect that I have reviewed the exhibits in this trial, have opened the exhibits which have been prepared by Mr. Freeman [Court Reporter] and were placed in his custody and were sealed and that there is no such note.

MR. MOUNTFORD: I understand that, Your Honor.

THE COURT: In the file, I would further state that to the best of my knowledge I did not send any such note to the jury. And I would further state that Mr. Haney, the Attorney for the defendant, had made several requests to me to call the jury back in and impose a life sentence in view of the fact that the jury had been in the juryroom for a length of time and I declined to do so, and advised Mr. Haney that I was going to let the jury continue to deliberate for some further time because I did not feel that it would be proper to call them back into the courtroom at that time. And I will state under oath, as a District Judge, that I did not prepare and did not send any such note to the jury.

MR. MOUNTFORD: Could I inquire of the Court then, did you send any note to the jury?

THE COURT: Yes, sir, I did send a note to the jury. And you have made reference, I believe, to that note in your motion for a new trial, which is a note that I did send to the jury, yes. Do you want to go into that further?

MR. MOUNTFORD: No, not at this time. Are you saying then, Your Honor, you only sent one note to the jury?

THE COURT: To the best of my knowledge, that is my statement, yes.

MR. MOUNTFORD: Well, I recall, Your Honor, and like I said, I'm an officer of the court, I did come over here and we attempted—Mr. Freeman may recall or may not recall, we attempted to find that. We found one note that had been tore into but we did not—we did not find that note.

MR. DeMIER: If it please the Court, Your Honor, I believe the affidavit of Mr. Mountford does not say that you sent it. He states you said you were going to send it. His affidavit does not set out that you did send it or he saw you send it.

MR. MOUNTFORD: No, I think it sets out that he did send it.

THE COURT: Well, let me examine the affidavit. I have it right here before me.

MR. DeMIER: I'm sorry, it does say that you did send it.

MR. MOUNTFORD: See, that's why the jury come back in that 10 minute period is my understanding.

THE COURT: Well, as I have stated before, I do not recall sending any such note to the jury.

MR. MOUNTFORD: We did attempt to find that note.

THE COURT: I have no recollection of having sent any such note to the jury stating that if they did not return within 10 minutes that I was going to bring them back into the courtroom. You didn't see any such note, did you, Mr. Mountford?

MR. MOUNTFORD: That particular note, I don't believe I did. I saw the other note. We tried to find the note.

THE COURT: Who tried to find it?

MR. MOUNTFORD: Well, G.C. [Court Reporter] and I. We could not find it. The one note that we found was torn.

THE COURT: And do you know what disposition was made of that note?

MR. MOUNTFORD: Which one is that?

THE COURT: The one that was torn?

MR. MOUNTFORD: Well, it's there, isn't it?

THE COURT: Well, this note is not torn. It is a complete note that I sent to the jury.

MR. MOUNTFORD: That's when they inquired as to whether or not they could assess a life without parole. That note, I remember that note.

THE COURT: Yes, sir. That's the only note that I have any memory of sending.

MR. MOUNTFORD: Then it's your statement, Your Honor, that you did not send them a note or is it your statement that you don't recall?

THE COURT: My statement is that I do not recall sending them any such note.

MR. MOUNTFORD: If I was to bring some members of the jury, and I have not talked to any members of the jury because it's my understanding it's improper, but we attempted to find that note. It is my recollection that the parties involved, at that time, did remember such a note and we attempted to find it and we could not find it. The notes were left, of course, in the juryroom. That would have been the last note or the last type of instruction that was sent to the juryroom before they returned or to—for the purpose of assessing the punishment. If the Court will grant me leave, then I would make inquiry of the jury. But it is my understanding that there was such a note sent, but that is why they come into the courtroom and told us to clear the courtroom, that the jury would be back in a few minutes.

THE COURT: Because I sent them a note?

MR. MOUNTFORD: Right.

THE COURT: That's why they would be in?

MR. MOUNTFORD: Yes. Mr. Freeman was there. He may recall or he may not. But we did get out of the courtroom and that's when we made inquiry if the jury was coming back and they said, no, they had been instructed to return and assess the penalty within 10 minutes, and if they had not done so, you were going to discharge them and assess life—a life penalty.

THE COURT: Well, then—

MR. MOUNTFORD: —And that's when you turned around and I looked kind of surprised like that and you said, well, that's what the law provides, and I take it that you indicated that that's what—

MR. DeMIER: —If it please the Court, Your Honor, that's their allegation. No note was found and those people who said these things have not been brought forth to testify and they were available for the defendant to subpoena if he needed to. I asked that this narrative type interrogation of the Court and conversation with the Court and defendant's counsel be terminated on the basis that they can't provide this phantom note that is supposed to have appeared.

MR. MOUNTFORD: Well, it's a complete surprise to me, is the statement of the Court because—

MR. DeMIER: —If it please the Court, Your Honor, whether or not the Court made that statement is not relevant if the fact no note appeared. This witness, he's testifying as a witness and attorney for the defendant both, he's testifying to nothing but blatant hearsay of what some other people told him and how the people on the jury knew about the note. Well, the note is not here and the jurors

aren't here and I don't believe it's proper for him to testify in this manner, nor have this narrative testimony between the Court and the witness, who is also the defendant's counsel.

THE COURT: Well, the Court will stand on its statement and I will decline, at this time, to grant leave to subpoena any further witnesses in regard to this matter.

MR. DeMIER: I don't know how the State cross-examines in this type of situation, so I object to it, Your Honor.

MR. MOUNTFORD: Well, as God is my witness, that's exactly what happened and that's what the Court said.

THE COURT: Well, I would have to state that I have no recollection of that and that I would have to say, Mr. Mountford, that you are incorrect.

MR. MOUNTFORD: I'll take an exception to that, Your Honor. We would asked leave to bring in members of the jury and continue this motion for new trial.

THE COURT: The request is denied.

Was there a second note sent to the jury? That question is not answered by the record. If such a note was sent, it could be construed as being coercive in forcing a verdict by the jury. I believe the court should have continued the hearing on the motion for new trial and allowed counsel to subpoena, at least, the jury foreman. The only inquiry would have concerned whether or not a second note was sent to the jury. This appears to be pertinent because the trial judge did not remain unequivocal in his answers. If there is any doubt, it should be resolved in appellant's favor. In *Wilson v. State*, 534 P.2d 1325 (Okl.Cr.1975), this Court stated in its dictum, while discussing the question of prejudice toward a defendant, "The court could call the bailiff, judge and jurors to testify as to what occurred and effect of such occurrence." At 1326, 534 P.2d. I believe the court in this case should have allowed counsel to subpoena the jury foreman to clarify the question of the second note. As the record now stands, any prejudice toward appellant remains unresolved.

APPLICABLE PROVISIONS OF THE CODE OF OKLAHOMA

O.S. 21 §172

All persons concerned in the commission of crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, are principals.

O.S. 21 §701.7 Murder in the first degree

A. A person commits murder in the first degree when he unlawfully and with malice aforethought causes the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof.

B. A person also commits the crime of murder in the first degree when he takes the life of a human being, regardless of malice, in the commission of forcible rape, robbery with a dangerous weapon, kidnapping, escape from lawful custody, first degree burglary or first degree arson.

O.S. 21 §701.8 Murder in the second degree

Homicide is murder in the second degree in the following cases:

1. When perpetrated by an act imminently dangerous to another person and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual; or

2. When perpetrated by a person engaged in the commission of any felony other than the unlawful acts set out in Section 1, Subsection B, of this act.

O.S. 21 §701.9 Punishment for murder

A. A person who is convicted of or pleads guilty or nolo contendere to murder in the first degree shall be punished by death or by imprisonment for life.

B. A person who is convicted of or pleads guilty or nolo contendere to murder in the second degree shall be punished by imprisonment in a state penal institution for not less than ten (10) years nor more than life.

O.S. 21 §701.10 Sentencing proceeding - Murder in the first degree

Upon conviction or adjudication of guilt of a defendant of murder in the first degree, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable without presentence investigation. If the trial jury has been waived by the defendant and the state, or if the defendant pleaded guilty or nolo contendere, the sentencing proceeding shall be conducted before the court. In the sentencing proceeding, evidence may be presented as to any mitigating circumstances or as to any of the aggravating circumstances enumerated in this act. Only such evidence in aggravation as the state has made known to the defendant prior to his trial shall be admissible. However, this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Oklahoma. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

O.S. 21 §701.11 Instructions - Jury findings of aggravating circumstance

In the sentencing proceeding, the statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury, if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this act is so found or if it is found that any such aggravating circumstance is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life.

O.S. 21 §701.12 Aggravating circumstances

Aggravating circumstances shall be:

4. The murder was especially heinous, atrocious, or cruel;

O.S. 21 §701.13 Death penalty - Review of sentence

A. Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Oklahoma Court of Criminal Appeals. The clerk of the trial court, within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the Oklahoma Court of Criminal Appeals together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Oklahoma Court of Criminal Appeals.

B. The Oklahoma Court of Criminal Appeals shall consider the punishment as well as any errors enumerated by way of appeal.

C. With regard to the sentence, the court shall determine:

1. Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

2. Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in this act; and

3. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

D. Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

E. The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

1. Affirm the sentence of death; or

2. Set the sentence aside and remand the case for modification of the sentence to imprisonment for life.

F. The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

O.S. 22 §749

In the investigation of a criminal offense, the district attorney or any peace officer may take the sworn statement of any person having knowledge of such criminal offense. Any person charged with a crime shall be entitled to a copy of any such sworn statement...,

O.S. 22 §916

The jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense.

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
MAY 9 1983
Ross N. Leonard, Jr.
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

FOR PUBLICATION

CHARLES WILLIAM DAVIS,)
Appellant,)
-vs-) No. F-78-140 & F-78-141
THE STATE OF OKLAHOMA,)
Appellee.)

AUTHORIZED FOR FILING
MAY 9 1983
COURT OF CRIMINAL APPEALS

- O P I N I O N -

POWERS, Special Judge:

The appellant was convicted of Murder in the First Degree and sentenced to death in Oklahoma County cases no. CRF-77-2905 and 2906. The jury assessed the death sentence after finding the following three (3) aggravating circumstances in each case: that the murder was especially heinous, atrocious or cruel; the defendant was previously convicted of a felony involving the use or threat of violence to the person; the defendant knowingly created a great risk of death to more than one person. On March 16, 1978, the Honorable David M. Cook imposed the judgments and sentences, and the sentences of death were stayed by this Court in its Order of March 23, 1978, pending the resolution of this appeal. Oral argument was heard by this Court on August 31, 1981.

The two victims of an early morning shooting on August 13, 1977, at the appellant's apartment in Oklahoma City, were Dennis McLaughlin and Robert Wayne Jones. Wounded but not killed during that same incident were Kathy Jones Rogers, also known as Kathy Jones Davis, and Henry Jones. A total of six (6) bullets were fired from the .38 caliber revolver.

Three days prior to the homicide, the same four individuals met with the appellant at a Humpty Dumpty store parking lot in Sapulpa, apparently with reference to the marital separation of Kathy Rogers and the appellant. Robert Jones and Henry Jones, Kathy's brothers, and Dennis McLaughlin, their friend, accompanied Kathy to the Sapulpa meeting.

The group then appeared at the appellant's apartment early on Saturday morning, August 13, to remove Kathy's possessions from the apartment of her estranged husband. Kathy Rogers and Henry Jones testified that the four first stopped by the Oklahoma City Police station to obtain protection in their visit to the appellant's apartment, but they were unsuccessful. After all of Kathy's property had been removed from the premises, the four returned to the apartment for a final survey, and it was at this point that the appellant shot them.

In his first proposition of error, the appellant maintains that the trial court denied him his right to present mitigation in his behalf and deprived him of due process and equal protection of the laws when the court failed to provide funds for expert witnesses or to give him a presentence investigation.

This Court has held that there is no right to State funds to hire an investigator or a psychiatrist to present mitigating factors on behalf of a defendant. Eddings v. State, 616 P.2d 1159 (Okl.Cr.1980). The right to counsel is guaranteed by the Constitution, but that right has not been interpreted to include expert assistance in the determination of appropriate punishment. Furthermore, the appellant's assertion that the court should have granted the requested presentence investigation report is without merit. The purpose of the presentence investigation is to provide "...a recommendation as to appropriate sentence, and specifically a recommendation for or against probation." Laws 1975, ch. 369, § 1; now 22 O.S.Supp.1980, § 982. That statute specifically excludes those cases in which the death penalty is imposed. And this Court has held that the denial of pretrial motions for a presentence investigation report and appointment of a psychiatrist in a case in which a defendant has been sentenced to death was not error under this statute. Irvin v. State, 617 P.2d 588 (Okl.Cr.1980), reaffirming Bills v. State, 585 P.2d 1366 (1978).

The appellant alleges, in his second argument, that the jury was selected in violation of the standards mandated by the United States Supreme Court. Certain jurors were excluded for cause, over the objection of defense counsel, as a result of their beliefs

regarding the death penalty.

In Witherspoon v. Illinois, the Supreme Court held "...that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), at 20 L.Ed.2d 784-85. In a footnote to that opinion, the Court said, "The most that can be demanded of a venireman in this regard is that he be willing to consider all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge...." Footnote 21, at 20 L.Ed.2d 785.

In the case before this Court, the trial court systematically asked the jurors two questions as follows:

> In a case where the law and the evidence warrant, in a proper case, could you, without doing violence to your conscience, agree to a verdict imposing the Death Penalty?

If the juror's reply was negative, the court asked:

> If you found beyond a reasonable doubt that the Defendant in this case was guilty of Murder in the First Degree, and if under the evidence, facts and circumstances of the case the law would permit you to consider a sentence of death, are your reservations about the Death Penalty such that regardless of the law, the facts and the circumstances of the case, you would not inflict the Death Penalty?

The appellant contends that in excluding several of the jurors the trial court violated the rule in Witherspoon. A review of the record indicates that Juror Rockel was properly excluded due to her inability to positively answer that she could inflict the death penalty under the appropriate circumstances. Furthermore, the following jurors were properly excluded: Hood, Childress, Silloway, Derrick and Hearst. However, the exclusion of three others requires a more thorough analysis.

The court conducted the following voir dire of Juror Metivier:

THE COURT: I ask you: In a case where the law and the evidence warrant, in a proper case, could you, without doing violence to your conscience, agree to a verdict imposing the Death Penalty?

MS. METIVIER: I have problems with that.

THE COURT: You what?

MS. METIVIER: I have problems with that.

THE COURT: You have problems with the Death Penalty? And I ask you a second question: If you found beyond a reasonable doubt that the Defendant was guilty of Murder in the First Degree, and if under the evidence and the facts and the circumstances of the case the law would permit you to consider a sentence of Death, are your reservations about the Death Penalty such that regardless of the law, the facts and the circumstances of the case, you would not inflict the Death Penalty?

MS. METIVIER: No.

THE COURT: You would not inflict the Death Penalty in spite of the evidence, the law and the circumstances of the case? Do I understand you?

MS. METIVIER: Right.

MR. STUART: May I be allowed to ask an additional question?

THE COURT: Yes.

MR. STUART: Ms. Metivier, my question, and I am asking you, do I hear you right? Are you saying that you could never impose the Death Penalty in any case? You are not saying that under a proper case, that you couldn't consider imposing the Death Penalty?

MR. COATS: I object to the form of the question, Your Honor.

THE COURT: The form of the question is improper. It is sustained.

MR. STUART: Ms. Metivier, you are not saying you would automatically refuse to impose the Death Penalty in any case, are you?

MS. METIVIER: No, I'm not.

MR. STUART: That's all I have.

THE COURT: I ask you again: If you found beyond a reasonable doubt that this Defendant was guilty of Murder in the First Degree, and if under the evidence and facts and circumstances of this case, the law would permit you to consider a sentence of death, are your reservations about the Death Penalty such that regardless of the law, the facts and the circumstances of the case, you would not inflict the Death Penalty?

The reason I repeat the question is because you answered that you would not under any circumstances inflict the Death Penalty when I first asked the question. How do you answer the question now?

MS. METIVIER: I just don't believe in taking one's life. I'm not -- You know, --

THE COURT: You are excused for cause.

MR. STUART: May I approach the bench?

THE COURT: Come to the bench.

(The following proceedings were had out of the hearing of the jury.)

MR. STUART: I am going to object to excusing this Juror for cause. I will move for a mistrial on the basis of this. This Juror answered my questions of: Would you automatically refuse to impose the Death Penalty? And she said No.

THE COURT: The objection is overruled.

The Juror Metivier answered "I have problems with that" when asked if she could, in a proper case, agree to imposing the death sentence. She answered "Right" when asked if she would not inflict the death penalty in spite of the evidence, the law, and the circumstances. When that question was repeated by the Court, she answered "I just don't believe in taking one's life."

Although the Juror gave conflicting answers to questions by the Court and Counsel, her answers, when viewed in their entirety, clearly indicated her inability to consider the death sentence under any circumstances.

We now examine the excusing for cause of Juror Dragus. While the majority of her answers were tentative, she positively stated that she would not inflict the death penalty. And although the question defense counsel was prohibited from posing was no more confusing than the court's questions, it, nevertheless, was not the appropriate question. Juror Dragus had already given a positive indication of her inability to vote for capital punishment.

Finally, we consider the excusing on voir dire of Juror Musgrave:

THE COURT: In a case where the law and the evidence warrant, in a proper case, could you, without doing violence to your conscience, agree to a verdict imposing the Death Penalty?

MS. MUSGRAVE: I believe I could.

THE COURT: That is not a sufficient answer. I take that as being an answer tantamount to saying that you don't know. I will ask it again.

In a case where the law and the evidence warrant, that is a proper case, could you, without doing violence to your conscience, agree to a verdict imposing the Death Penalty?

MS. MUSGRAVE: I don't believe I could.

THE COURT: You don't believe you could? If you found beyond a reasonable doubt that the Defendant in this case was guilty of Murder in the First Degree and if under the evidence, facts and circumstances of the case the law would permit you to consider a sentence of death, are your reservations about the Death Penalty such that regardless of the law, the facts and the circumstances of the case, you would not inflict the Death Penalty?

MS. MUSGRAVE: No.

THE COURT: Ma'am?

MS. MUSGRAVE: No. I don't think I would.

THE COURT: You would not?

MS. MUSGRAVE: Huh-uh.

THE COURT: Is that a positive answer?

MS. MUSGRAVE: Yes, sir.

THE COURT: Or not?

MS. MUSGRAVE: Yes, sir.

MR. STUART: The same objection, Your Honor.

THE COURT: All right. The objection is overruled.

MR. STUART: May I be allowed to ask one question?

THE COURT: Yes, you may.

MR. STUART: Miss Musgrave, I believe I heard you say to that final question that you don't think you would. Now, that -- Do I hear that to mean that you could possibly impose the Death Penalty in some particular case?

MS. MUSGRAVE: Yes. That is right.

MR. STUART: Yes, ma'am. That's all I have.

THE COURT: Well, I ask again. In this case if the law and the evidence warrant, in a proper case, if this is a proper case, could you, without doing violence to your conscience, agree to a verdict imposing the Death Penalty? I cannot accept anything short of a positive response to that question, Miss Musgrave. Yes or no?

MS. MUSGRAVE: No. I would say no.

THE COURT: All right. Anything further?

MR. STUART: Yes, sir. May I approach the bench?

THE COURT: Yes.

(The following proceedings were had out of the hearing of the jury.)

> Mr. STUART: At this time, we move for a mistrial, and we would object to any excusing of Mrs. Musgrave for cause as on this second question she said, "I think I could." She told me she could in a proper -- She didn't say she couldn't in any case, and that is what Witherspoon is directed at, and we strenuously object to excusing this Juror.
>
> MR. COATS: I would say Counsel's questions were so leading that she would answer it -- She has fairly answered the Judge's questions set out by the Court which is proper, and we move to have her excused.
>
> MR. STUART: May I further say on the record that I think the Judge's question regarding this particular case is not the proper question. A proper case is to be determined by the Jury. This case is not in point now. They can't properly even consider it. The proper question is whether or not they could consider imposing the Death Penalty in some case or a proper case. Not this particular case.
>
> THE COURT: The Defendant's objection is overruled. The Juror will be excused for cause.

(The following proceedings were had in the hearing of the jury.)

> THE COURT: Thank you, Mrs. Musgrave. You are excused for cause.

First, Juror Musgrave indicated that she believed that she could agree to the death penalty without doing violence to her conscience. The court demanded a more positive answer and she said that she didn't believe she could agree to the death penalty without its having an effect on her conscience. Then the court asked her his standard, "Would your reservations prevent you from voting for the death penalty?" question. She said, "No," followed by, "No. I don't think I would." The defense attorney then asked if that meant she could possibly impose the death penalty in a particular case, and she said, "Yes. That is right." Finally, the court asked her his standard, "Could you agree to a verdict imposing the death penalty without its doing violence to your conscience?" question, and she answered, "No."

As was the case in the voir dire of the Juror Metivier, the answers of the Juror Musgrave were also conflicting and confusing. However, when viewed in their entirety, her answers also clearly indicated her inability to consider the death sentence under any circumstances.

The Supreme Court has held that a sentence of death cannot be upheld if potential jurors are excluded from the panel imposing that punishment on the basis of their personal beliefs about the death penalty. Witherspoon, supra. The only legitimate concern upon voir dire of the jury panel is whether they will consider the imposition of the death sentence, as one of the alternatives provided by state law, should the case be appropriate for that punishment.

The voir dire examination of the jurors Metivier, Dragus and Musgrave, as set out herein, followed the guidelines set forth in Koonce v. State, 456 P.2d 549 (Okl.Cr.1969) and Gibson v. State, 501 P.2d 891 (Okl.Cr.1972). When the voir dire examination is viewed in its entirety as to each juror, and in the light most favorable to the defendant, the trial judge could only conclude that the mind of each juror was that said juror was irrevocably committed, before the trial began, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. Their answers were ambiguous, hesitant and equivocal. The trial judge was in a position to view the facial expressions, voice inflection, and mannerism in answering the questions on voir dire. He evaluated the responses from the totality of the courtroom environment and experience on that day. The record supports his evaluation. Accordingly, no error occurred in excusing the jurors.

The appellant's third proposition addresses the excusing for cause of jurors who cannot state that they could consider the death penalty under Witherspoon vis a vis the challenge of jurors for implied bias, R.L. 1910, § 5859; now 22 O.S.1981, § 660. The State's classification of this as a suggestion by the appellant that this Court ignore the mandate of the Supreme Court in Witherspoon or hold 22 O.S.1981, § 660, unconstitutional is unfounded. The Supreme Court did not hold that jurors who could not consider the death penalty must be excluded, it simply said that was a valid basis for exclusion.

THE HONORABLE DAVID M. COOK, DISTRICT JUDGE

CHARLES WILLIAM DAVIS, appellant, was convicted of Murder in the First Degree, in Oklahoma County District Court, Cases No. CRF-77-2905 and CRF-77-2906. He was sentenced to death and appeals. AFFIRMED.

ROBERT A. RAVITZ
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ASSISTANT ATTORNEY GENERAL
TOMILOU GENTRY LIDDELL
LEGAL INTERN
OKLAHOMA CITY, OKLAHOMA
Attorneys for Appellee

BUSSEY, P. J.: Concurs
BRETT, J.: Concurs in part and dissents in part

While I agree that the conviction for Murder in the First Degree should be affirmed, I cannot concur with the majority that the death sentence should be affirmed because I believe that Jurors Metivier and Musgrave were excused in violation of Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

When the court asked Juror Metivier the question ending, "...[A]re your reservations about the [d]eath [p]enalty?" She answered, "No."[1] A negative response to that question must be interpreted to mean, "No, my reservations are not such that I would not inflict the death penalty." However, the trial judge, attempting to clarify the confusing question, asked it more simply and she indicated that she would not inflict the death penalty.

At this point, Juror Metivier had given two answers in direct conflict. Then the defense attorney asked her if she was saying that she would automatically refuse to impose the death penalty, and she replied, "No, I'm not." The court repeated its second question, and her reply reflected her beliefs when she said,

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[1]Confusion apparently stems from the use by the court of a question couched in negative language.

"I just don't believe in taking one's life..." It did not reflect her willingness to consider death as a punishment.

The Supreme Court has held that a sentence of death cannot be upheld if potential jurors are excluded from the panel imposing that punishment on the basis of their personal beliefs about the death penalty. Witherspoon, supra. The only legitimate concern upon voir dire of the jury panel is whether they will consider the imposition of the death sentence, as one of the alternatives provided by state law, should the case be appropriate for that punishment.

With this in mind, the trial court's standard first question is not pertinent. The second question is confusing to read, and it must be even more confusing to hear. Given that, and Juror Metivier's response to the defense attorney's question, the excusal for cause of this juror was error.

I also believe that the majority's analysis of the voir dire of Juror Musgrave is clearly erroneous. First, Juror Musgrave indicated that she believed that she could agree to the death penalty without doing violence to her conscience. The court demanded a more positive answer and she said that she didn't believe she could agree to the death penalty without its having an effect on her conscience. Then the court asked her his standard, "Would your reservations prevent you from voting for the death penalty?" question. She said, "No," followed by, "No. I don't think I would." The defense attorney then asked if that meant she could possibly impose the death penalty in a particular case, and she said, "Yes. That is right." Finally, the court asked her his standard, "Could you agree to a verdict imposing the death penalty without doing violence to your conscience?" question, and she answered, "No."[2] As I have already said, whether it would do

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[2]The crucial determination is whether the juror would conscientiously consider the death penalty as one of the punishment alternatives, not whether it wuold affect her conscience.

violence to her conscience is not the issue. This area is replete with confusion, and the only two things that are clear are as follows: It would affect her conscience. And this would not prevent her from considering the death penalty under the appropriate circumstances.

The exclusion of Juror Musgrave was error.

For these reasons, I believe that the sentence should be modified to imprisonment for life.

Supreme Court, U.S.
FILED
MAY 26 1983
Alexander L. Stevas, Clerk

OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 82 - 6230

RECEIVED
MAY 31 1983
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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

LARRY DEAN SMITH,

Petitioner,

-v.-

STATE OF OKLAHOMA

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

Upon the annexed affidavit of petitioner, Larry Dean Smith, petitioner asks leave to file the attached petition for Writ of Certiorari to the Oklahoma Court of Criminal Appeals without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

Ursula Bentele
250 Joralemon Street
Brooklyn, New York 11201

Attorney for Petitioner

LARRY DEAN SMITH,)
)
Petitioner,)
) 82-6830
v.)
)
STATE OF OKLAHOMA,)
)
Respondent.)

AFFIDAVIT IN SUPPORT OF MOTION
TO PROCEED IN FORMA PAUPERIS

I, LARRY DEAN SMITH, being first duly sworn, state that I am Petitioner in the above entitled case; that in support of my motion to proceed without being required to pay fees, costs, or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I was previously granted leave to proceed without costs, on grounds of poverty, during proceedings on this case in the Oklahoma Court of Criminal Appeals.

I further swear that the responses which I have made to the questions below relating to my ability to pay the cost of prosecuting the appeal are true:

1. Are you presently employed?

Answer: No, I am presently in the custody of the Oklahoma Department of Corrections, serving the sentence for which I am petitioning the Court for review. I have been imprisoned since 2-7-80.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest dividends, or other sources?

Answer: No.

3. Do you own any cash or checking or savings account?

Answer: Yes, my institutional account currently contains $ [illegible].

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)?

Answer: No.

5. List the persons who are dependent upon you for support and state your relationship to these persons.

Answer: None.

I understand that a false statement or answer to any questions in this Affidavit will subject me to penalties for perjury.

LARRY DEAN SMITH

STATE OF OKLAHOMA)
) SS:
COUNTY OF PITTSBURG)

Subscribed and sworn to before me on this 19 day of May, 1982.

James R. Eastham
Notary Public

My Commission Expires:

6-25-85